Supreme Court, U.S.
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No. 00-640

IN THE

Supreme Court of the United States

JAMES McGUIRE, *et al.*,

Petitioners,

v.

ROCK COUNTY BOARD OF SUPERVISORS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE BROOKLYN RESPONDENTS

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RESPONDENTS' BRIEF IN OPPOSITION

Background.[1]

The District Court for the Western District of Wisconsin granted the Village of Brooklyn, the Village of Brooklyn Police Department, and William Roberts, who is a Brooklyn police officer (the "Brooklyn respondents"), summary judgment, which the Seventh Circuit Court of Appeals affirmed. In between those rulings the district court conducted a jury trial on the petitioners' claims against Rock County Sheriff's Deputy Curtis Fell. Officer Roberts testified at that trial, but there is no official trial transcript.

The petitioners' claims against the Brooklyn respondents arise out of the activities of Officer Roberts on New Year's Eve, 1996, when he and Deputy Fell received the task of investigating a car in a rural ditch at a highway intersection on the border between Rock County and Green County, Wisconsin, within a mile of the petitioners' Green County home. The officers found no one in that car, which belonged to the petitioners. Deputy Fell then proceeded to the petitioners' home to inquire about the accident, while Officer Roberts waited with the car for the arrival of a tow truck. While waiting for the tow, Officer Roberts received a call from the Green County dispatcher, who explained that the Rock County Sheriff's Department could no longer contact its deputy. The Green County dispatcher asked Officer Roberts to go to the petitioners' home to check on the deputy. (Based on their reading of the Green County dispatcher's log, the petitioners dispute Officer Roberts' assertion that he received such a request.)

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1. This history appears in affidavits constituting docket numbers 85, 86, 108, 138 and 139.

When Officer Roberts arrived at the petitioners' home the storm door at the top of the steps leading to the petitioners' unheated porch was not locked or secured. Officer Roberts did not notice any doorbell, walked across the porch, and knocked on the door leading from the porch to what turned out to be the petitioners' kitchen.

As soon as Officer Roberts knocked, one of the petitioners (Mrs. McGuire) opened the door. It was cold outside, and Officer Roberts stepped across the threshold long enough to ascertain that the deputy was alright. (The petitioners heard no knock, and assert that Mrs. McGuire opened the door at the instruction of Deputy Fell.)

When he entered the kitchen, Officer Roberts discovered that Deputy Fell had Mr. McGuire in custody. Mr. McGuire was in handcuffs, and Deputy Fell appeared to be somewhat out of breath. The deputy told Officer Roberts that he had arrested Mr. McGuire for "resisting." Before proceeding to the petitioners' home, Deputy Fell made no suggestion that he intended to make any arrest, and until Officer Roberts arrived at the petitioners' home, he was unaware of any arrest.

The petitioners assert that Deputy Fell told Officer Roberts to leave the house, but at no time did the petitioners themselves object to Officer Roberts' presence, and at no time did they tell him or ask him to leave. When Mrs. McGuire opened the door she did not block the doorway or give any indication, either verbal or physical, that she did not consent to Officer Roberts' entry.

Officer Roberts did step back outside in order to let the dispatcher know that Deputy Fell was okay. Then he

accompanied the deputy and Mr. McGuire from the petitioners' house to the deputy's car because the conditions were icy and Officer Roberts was concerned that Mr. McGuire, who remained in handcuffs, might fall.

Later that evening Officer Roberts returned to the petitioners' home and asked Mrs. McGuire for the keys to the petitioners' car. She gave him those keys without objection, and he delivered them to the tow truck driver, who then returned the car to Mrs. McGuire. Mrs. McGuire again gave no indication that she had any objection to Officer Roberts' presence at her home.

Officer Roberts did not request a prosecution of Mr. McGuire, nor did he become involved in Mr. McGuire's prosecution.

REASONS FOR DENYING THE WRIT

1. Mrs. McGuire consented to Officer Roberts' entry into the petitioners' home.

As the petitioners point out, Deputy Fell, like Officer Roberts, entered the petitioners' porch before he had any contact with the petitioners. The jury that heard the petitioners' claims against Deputy Fell determined that he did receive Mrs. McGuire's consent to enter their home, and that he did not use excessive force when he arrested Mr. McGuire, despite the petitioners' allegations that Deputy Fell had forced his way in, without permission, and also despite the petitioners' assertions that once inside their home Deputy Fell physically abused Mr. McGuire.

The petitioners assert that by entering their porch in order to knock on the door leading from that porch to the kitchen, Officer Roberts also violated the petitioners' Fourth Amendment privacy rights, but Officer Roberts entered that porch and knocked on the kitchen door only because he did not notice any doorbell in the vicinity of the storm door leading into the porch.

> Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's "castle" with the honest intention of asking questions of the occupant thereof -- whether the questioner be a pollster, a salesman, or an officer of the law.

Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964).[2] Deputy Fell and Officer Roberts did not arrive at high noon, but on the other hand the petitioners did leave their car in the ditch, on New Year's Eve, without bothering to notify the police, who then had to make their own investigation. Under the circumstances a visit from the authorities should have been no surprise.

Moreover, when Officer Roberts arrived and knocked on the kitchen door, it was opened to him, without opposition. The gesture of opening the door, and of permitting Officer Roberts to enter, without objection, constitutes consent to

2. Cf. the petitioners' suggestion, at pages 13, 15 and 16 of their petition, that it was illegal for the police even to enter the petitioners' yard.

enter. *United States v. Cotnam*, 88 F.3d 487 (7th Cir. 1996). "The Fourth Amendment prohibits the police from making a warrantless nonconsensual entry into a suspect's home in order to make a routine felony arrest or to conduct a search. . . . A person can, however, consent to the entry of their home or hotel, and consent need be neither express nor verbal." *Id.* at 495. (Mrs. McGuire's assertion that she heard no knock is irrelevant; for the purposes of her petition the question is whether her actions reasonably supported Officer Roberts' perception that she was allowing him into the house.) Officer Roberts made no demands of any sort, and departed shortly. His behavior in gaining admission to the petitioners' kitchen amounted to nothing more than actions countenanced everyday in polite society.

In opposition the petitioners cite *United States v. Dunn*, 480 U.S. 294 (1987), which concerned a warrantless view into a barn by police officers looking for controlled substances and for equipment and chemicals used in the production of controlled substances. The Supreme Court determined that the barn in question was not within the curtilage of the defendant's house, and therefore was not subject to the protections of the Fourth Amendment. In our case Officer Roberts was not conducting a warrantless search; he was merely knocking on the petitioners' door to inquire after Deputy Fell. His behavior was comparable to that of the officers involved in *Davis v. United States*, *supra*, at 303: "The uncontradicted evidence of the officers was that at the time they went to defendant's residence, it was not their intention to arrest the defendant nor to search the premises. They went there for the purpose of talking to Davis, whom none of them, apparently, had ever met before." Similarly it was not objectively unreasonable in our case for the police to travel to the petitioners' residence to ask what had become of the occupants of the petitioners' car.

At pages 13 and 14 of their petition the petitioners suggest that Mrs. McGuire was so "stunned" by the arrival of the police that she had no "ability to give informed consent or make voluntary waiver of constitutional rights of herself and of her family members, thereby negating the flawed jury verdict." Of course the fact of the matter is that the jury rejected the petitioners' claims that Deputy Fell had no consent to enter, and it is not the function of appellate courts to second-guess the jury on matters of credibility. *United States v. Hickok*, 77 F.3d 992, 1006 (7th Cir. 1996.) In pursuit of this theme the petitioners cite *United States v. Rosario*, 962 F.2d 733 (7th Cir. 1992), but in *Rosario* the appellate court ruled that even persons having apparent (as opposed to actual) authority over private premises may give the police effective consent to enter and search. Mrs. McGuire had both apparent and actual authority to admit the officers.

The petitioners also cite *Amos v. United States*, 255 U.S. 313 (1920), but *Amos* arose out of a situation in which a pair of revenuers, "without warrant, demand[ed] admission to make search of [private property] under government authority. . . ." *Id.* at 317. Speaking for the court, Justice Clarke explained that the government agents' admission to that property under those circumstances could not properly be considered consensual. Our situation is different for a couple of reasons. First, unlike the revenue officers in *Amos*, Officer Roberts never demanded admission to the petitioners' home. He knocked on the door, Mrs. McGuire opened it to him and allowed him to enter without objection, he stepped briefly into the kitchen, and then he left. The next time he approached Mrs. McGuire was to ask for the keys to the petitioners' car, and again Mrs. McGuire gave no indication that he lacked her consent to be on the property. Second, the *Amos* court suggested that whether a wife, in the absence of

her husband, can admit police officers into her home is an open question. In light of the concepts of apparent authority discussed in *Cotnam* and *Rosario*, *supra*, and in light of the abandonment of legal concepts of wifely subservience, any suggestion that Officer Roberts was not entitled to rely on Mrs. McGuire's behavior is ill-founded.

Johnson v. United States, 333 U.S. 10 (1948), cited at pages 11 and 23 of the petition, also concerned a situation in which law enforcement officers searched private living quarters, although they had no warrant and no consent. In *Johnson* a police officer informed the defendant that "I want you to consider yourself under arrest because we are going to search the room." *Id.* at 12. Officer Roberts made no such demands, and took no such action. Moreover, again in light of *Cotnam* and *Rosario*, *supra*, there is no merit to any suggestion that a police request for entry (without more) is by definition coercive simply because the person making the request is a police officer.

2. Officer Roberts had proper police authority in Green County

Section 66.305(1), Wis. Stats., provides that "[u]pon the request of any law enforcement agency . . . , the law enforcement personnel of any other law enforcement agency may assist the requesting agency within the latter's jurisdiction, notwithstanding any other jurisdictional provision." In our case — as Officer Roberts explained in his affidavits — the Green County Sheriff's Department asked Officer Roberts to investigate an accident that occurred on the border between Green County and Rock County. When he arrived at the accident scene, Officer Roberts found the petitioners' car in the ditch on the Rock County side of

the highway. Section 175.40(4), Wis. Stats., provides that a "peace officer whose boundary is a highway may enforce any law or ordinance that he or she is otherwise authorized to enforce by arrest or issuance of a citation on the entire width of such a highway and on the entire intersection of such a highway and a highway located in an adjacent jurisdiction." Under these rules Officer Roberts had proper police authority at the accident scene.

By virtue of section 66.305(1), Wis. Stats., Officer Roberts also possessed proper police authority when he arrived at the petitioners' Green County home because that trip fell reasonably within the scope of Green County's original request to investigate the accident (it is not unexpected that an officer would travel less than a mile to converse with the owner of a car abandoned under these circumstances), and because the Green County police subsequently asked him to go to that home. Such arrangements are not uncommon in rural areas of Wisconsin, where the ability to cross jurisdictional lines allows police agencies to share what in many instances is a very limited pool of help.

The petitioners seem to argue, on the strength of their interpretation of a Green County dispatcher's log and on the strength of the trial testimony of a Green County dispatcher (Jenson) who was not on duty at the time of the events underlying this suit, that Green County never asked Officer Roberts to follow up on Deputy Fell, and that Officer Roberts therefore never had any police authority at the petitioners' Green County home. However, neither that log nor Jenson's commentary on it requires a rejection of the affidavits Officer Roberts submitted in support of his motion for summary judgment, because the log does not include any transcript of

his conversations with the on-duty dispatcher. The log simply does not contradict Officer Roberts' explanation that Green County asked him to take certain actions in Green County, including a visit to the petitioners' home to see what had become of the deputy.

Moreover, as I point out elsewhere in this brief, even if Officer Roberts had no police authority beyond the Brooklyn village limits, he took no action at the petitioners' residence not permitted a private citizen.

3. Officer Roberts is entitled to a qualified immunity.

The qualified immunity I pled on Officer Roberts' behalf was probably unnecessary, because the petitioners' have not demonstrated that he somehow violated any of their civil rights, but in any event there is no indication that Officer Roberts was presented with a situation in which, under clearly settled law, he should have recognized that he was engaging in such violations.

As the Supreme Court explained in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), Officer Roberts is entitled to a dismissal, without trial, if his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The petitioners point out, in sweeping terms, that they enjoy various constitutional rights, including the right to privacy and a right to freedom from unreasonable searches. (The other rights invoked by the petitioners concern Mr. McGuire's arrest and prosecution, in which Officer Roberts had no involvement.) However, as Justice Scalia pointed out in *Anderson v. Creighton*, 483 U.S. 635 (1987), the petitioners cannot address the issue of clearly settled law

at an improperly high level of generality that transmutes the qualified-immunity doctrine into a "rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* at 640.

The proper questions in our case, insofar as Officer Roberts' qualified immunity is concerned, are necessarily more specific and can be fairly stated as follows:

1. Did clearly established constitutional law forbid him from traveling beyond the borders of the Village of Brooklyn?

2. Did clearly established constitutional law forbid him from crossing the petitioners' porch in order to knock on their door?

3. Did clearly established constitutional law forbid him from interpreting Mrs. McGuire's actions as consent to enter the petitioners' kitchen?

4. Did clearly established constitutional law forbid him from accompanying Mr. McGuire to the Rock County squad car in order to help prevent Mr. McGuire from slipping on the ice?

5. Did clearly established constitutional law forbid him from asking Mrs. McGuire for the keys to the petitioners' car so as to facilitate the removal of that car from a public ditch and the return of that car to the petitioners' home?

The petitioners would insist, on the basis of the dispatcher's log from the Green County Sheriff's

Department, that the answer to the first question is "yes" because, they tell us, that log demonstrates that Green County never requested Officer Roberts to do anything, and therefore he did not fall under the terms of the police mutual aid statute, sec. 66.305(1), Wis. Stats.

In actuality all that the petitioners have demonstrated is that the Green County dispatcher's log reflects contact between that dispatcher and Officer Roberts, but the log is cursory and incomplete. The affidavits of Officer Roberts and Rock County Lieutenant Dilley establish without contradiction that after Deputy Fell left the scene of the accident and proceeded to the petitioners' home, there did indeed come a point at which the Rock County Sheriff's Department could no longer reach him over the radio. Lieutenant Dilley became concerned about Deputy Fell's welfare, and asked the Rock County dispatcher to send another officer after Deputy Fell in order to see whether Deputy Fell was alright. Officer Roberts was not tuned to the Rock County frequency, but he did receive a request, via the Green County dispatcher, to go check on the deputy, and he honored that request. (Again, this history appears in the affidavits that constitute docket nos. 86, 138 and 139.) These facts are not changed because the Green County dispatcher failed to make complete notations in a radio log.

The mutual aid statute did confer police powers upon Officer Roberts at the petitioners' residence in Green County, beyond the borders of the Village of Brooklyn, but even if one were to conclude that the petitioners are somehow correct, and that while dealing with them Officer Roberts actually had no police power at all because he was outside his normal jurisdiction, the fact remains that he did nothing a private citizen could not properly do. Private citizens may travel to private homes and once there may knock on doors;

they may even enter when it appears they have consent to do so. In the absence of objection private citizens may help others traverse icy conditions, and may ask for car keys in order to assist in the extrication of cars from public ditches. The petitioners' arguments illustrate their misconception that Officer Roberts' status as a police officer somehow diminishes his freedom to travel and to make inquiries and take actions anyone else can make and take. *See, e.g., United States v. Benjamin*, 995 F.2d 756 (7th Cir. 1993), and *Davis v. United States*, *supra*.

The answer to each of the questions I have listed in this section is "no."

4. After Deputy Fell entered the petitioners' home, with Mrs. McGuire's consent, the petitioners had no legitimate expectation of privacy.

The jury found that Deputy Fell entered the petitioners' home with consent. For the duration of Deputy Fell's presence, including the time at which Officer Roberts arrived, the petitioners had no legitimate expectation of privacy. *Davis v. United States*, *supra*. The petitioners make no allegation that Officer Roberts made any greater intrusion than did Deputy Fell, or observed something that Deputy Fell did not observe, and of course the fact remains that Officer Roberts, also with Mrs. McGuire's apparent consent, did no more than briefly step across the kitchen threshold.

5. The Village of Brooklyn and its police department have no custom, practice or policy of engaging in illegal entries, false arrests or improper prosecution.

As Brooklyn Chief of Police Geske points out in his affidavit of October 5, 1998 (docket no. 85), the Village of Brooklyn, its police department and its police officers have no custom, practice or policy of illegal entry or illegal arrest. Accordingly the Village and its police department are entitled to summary judgment, as the doctrine of respondeat superior does not apply to civil rights claims. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). The McGuires did not contest this argument below, nor do they contest it now.

CONCLUSION

This is a case where the petitioners have demonstrated no compelling reasons for review. The petitioners have triggered none of the factors listed in Supreme Court Rule 10, nor have they shown any other basis for the Supreme Court to accept this case, which the courts below processed properly.

Respectfully submitted,

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